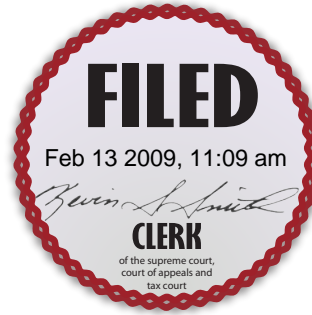


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

KAREN M. HEARD
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ARCHIE LEE PARKER,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)

No. 82A01-0806-CR-251

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Magistrate
Cause No. 82C01-0712-FD-1360

February 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Archie Lee Parker appeals his convictions of Class D felony residential entry,¹ Class D felony invasion of privacy,² and Class A misdemeanor interference with the reporting of a crime.³ He asserts the court abused its discretion in permitting a police officer to testify he knew Archie well enough to recognize his voice on a cellular telephone and to testify about what Archie had said on the phone. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 23, 2007, Diana Parker obtained a temporary protective order against her estranged husband, Archie. After a hearing on September 13, 2007, the court entered a permanent protective order requiring Archie to stay away from Diana and her house.

When Diana returned home in the afternoon of September 18, 2007, Archie was in her home. She attempted to call the police, but Archie unplugged the telephone. Diana then went outside, retrieved a big stick, and told Archie to get out of the house. Archie left out the back door of the house. Diana went out the door after him. Diana's neighbor and the neighbor's son, Carl Gist, were in their back yard. Gist heard Diana yelling that Archie was not supposed to be at her house. Diana went back in the house and called the police.

Officer Steve Shemwell responded to the dispatch. Diana explained what had happened and reported Archie had repeatedly called her cell phone to harass her since he

¹ Ind. Code § 35-43-2-1.5.

² Ind. Code § 35-46-1-15.1(1).

³ Ind. Code § 35-45-2-5(1).

left. As Officer Shemwell was filling out the report, Diana's cell phone rang. She answered the phone, listened for a moment, and then handed the phone to Officer Shemwell. He listened to the call without saying anything and heard Archie say, "Bitch, I'm going to get you." (Tr. at 59.) Officer Shemwell then handed the phone back to Diana.

The State charged Archie with residential entry, invasion of privacy, and interference with the reporting of a crime. A jury found Archie guilty of those crimes.⁴ The court sentenced Archie to two years for each Class D felony and one year for the Class A misdemeanor, with all three sentences to be served concurrently.

DISCUSSION AND DECISION

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Dixson v. State*, 865 N.E.2d 704, 709 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). An abuse of discretion occurs when the decision made was against the logic and effect of the facts and circumstances before the trial court. *Allen v. State*, 743 N.E.2d 1222, 1232 (Ind. Ct. App. 2001), *trans. denied* 761 N.E.2d 411 (Ind. 2001).

1. Evidence Rule 404(b)

At trial, the prosecutor asked Officer Shemwell:

Q: The person on the phone whose voice you heard was it a male or

⁴ The invasion of privacy crime was charged in two parts: the first was Class A misdemeanor invasion of privacy and the second was the enhancement to a Class D felony based on a prior conviction. After the jury found Archie guilty of the Class A misdemeanor, he pled guilty to the prior conviction enhancement.

female?
A: It was a male, sir.
Q: Have you heard that voice before?
A: Yes I have, sir.
Q: Do you know Archie Parker?
A: Yes I do, sir.
Q: Have you talked to Archie Parker?
A: Yes sir.
Q: On more than one occasion?
A: Yes sir.
Q: Did you recognize the voice on the other end of the phone?
A: Yes I did, sir.

(Tr. at 57.) Defense counsel objected on the basis of Evidence Rule 404 and asserted the testimony “gives the inference of multiple police contacts with an individual.” (*Id.* at 58.) The trial court overruled that objection.

Evidence Rule 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Rule 404(b) is meant to exclude evidence “only when it is introduced to prove the ‘forbidden inference’ of demonstrating the defendant’s propensity to commit the charged crime.” *Southern v. State*, 878 N.E.2d 315, 321 (Ind. Ct. App. 2007).

Archie asserts Officer Shemwell’s testimony suggested to the jury he had multiple contacts with police. We are not convinced the jury would have reached that conclusion. Officer Shemwell’s testimony did not indicate his contacts with Archie occurred in Shemwell’s capacity as a police officer, and it is just as likely that Officer Shemwell and

Parker knew each other from some other context. We have previously held “evidence which creates a mere inference of prior bad conduct does not fall within the purview of” the rule. *Dixson*, 865 N.E.2d at 712. Therefore, we find no error. *See id.*; *see also Allen*, 743 N.E.2d at 1232 (admission of testimony regarding defendant’s offer to work as a confidential informant did not violate Evid. R. 404(b) because it did not refer to any prior misconduct).

2. Hearsay

After identifying Archie as the speaker on Diane’s cellular telephone, Officer Shemwell testified Archie said, “Bitch, I’m going to get you.” (Tr. at 59.) Archie asserts that testimony was inadmissible hearsay.⁵ We disagree.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid. R. 801(c). However, a statement is not hearsay if it “is offered against a party and is (A) the party’s own statement. . . .” Evid. R. 801(d)(2). Officer Shemwell testified to Archie’s own statement, and the testimony was offered against Archie at trial. It was not hearsay. *See Banks v. State*, 761 N.E.2d 403, 406 (Ind. 2002). Accordingly, we find no error. *See id.*

⁵ Archie also asserts the admission of Archie’s statement on the phone violated Evidence Rule 403, which permits relevant evidence to be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice” To support this argument, Archie claims “the identity of the speaker was never positively established.” (Appellant’s Br. at 15.) However, Officer Shemwell positively identified the voice on the phone as Archie’s voice. (Tr. at 58.) In addition, just before Diana received the call, she had reported to Officer Shemwell that since Archie left her house he had been calling her repeatedly to harass her – that she handed the phone to Officer Shemwell permits the inference she also identified the caller as Archie. There was ample evidence Archie made the statement.

3. Fourth Amendment

Finally, Archie asserts the admission of Officer Shemwell's testimony regarding what Archie said on the telephone violated his right to be free of unreasonable search and seizure pursuant to the Fourth Amendment to the United States Constitution.

However, Archie did not object at trial on this basis. "A defendant may not argue one ground for an objection at trial and then raise new grounds upon appeal." *Dixon*, 865 N.E.2d at 712 n.7. Accordingly he has waived this argument for appeal. See *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002).

Nevertheless, we find no error. Nearly forty years ago, our United States Supreme Court held one party to a conversation can consent to government eavesdropping, and statements made by the other party will be admissible at trial. *U.S. v. White*, 401 U.S. 745, 752 (1971), *reh'g denied* 402 U.S. 745 (1971)). Therefore, no Fourth Amendment violation occurred when Diana consented to Officer Shemwell listening to the statements Archie believed he was making to Diana.⁶

CONCLUSION

Because the trial court did not abuse its discretion in admitting Officer Shemwell's testimony regarding Archie's voice and Archie's statement on the telephone, we affirm.

⁶ Archie asserts Diana did not consent to the eavesdropping because she "ended her participation in the communication when she handed the phone to the police officer." (Appellant's Br. at 16.) Archie provided no cogent argument or authority to support his claim that handing the phone to the officer negated consent for Fourth Amendment purposes. Accordingly he has waived this allegation for appeal. See Appellate Rule 46(A)(8)(a).

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.